(1)

Supreme Court, U.S.
FILED

961956 JUN 9 1997.

OFFICE OF THE CLERK

No. 96-

IN THE

Supreme Court of the United States

October Term, 1996

RICHARD A. COLE, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

RICHARD A. COLE, M.D.
Pro se Petitioner
8 Hallisey Drive
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(508) 462-8805

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

35 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Clerk of Court has de facto power to adjudicate Constitutional issues raised by habeas corpus petitions. Whether the Clerk of the Appeals Court should have plenary power to dismiss an appeal of a habeas corpus petition because of the alleged failure of appellant to file a brief when the appellant has shown by declaration that said brief was filed. Thus a hearing on the merits of the Constitutional issues has not occurred because of the Clerk.

2. Whether it is fundamentally unfair and a denial of due process of law to have the fate of a habeas corpus petition rest upon the bureaucratic vagaries of whether or not a busy Clerk of Court receives a petition and to allow dismissal of this Constitutional challenge without an opportunity for a hearing especially when the appellant has sworn testimony that the Clerk was served with the brief.

3. Whether it is fundamentally unfair and a denial of due process of law to deprive appellant of a hearing in the district court on a habeas corpus petition wherein he alleges ineffective defense counsel who failed to challenge a search and seizure warrant for bias and prejudice of the magistrate who issued the warrant, bias and prejudice of the two officers who swore to the affidavit underlying the warrant, documented perjury of one of those officers about her role in the case, and bias and prejudice of the trial judge. Not only was no hearing given in the district court, but no Answer was required of the government. This same petition was later dismissed without a hearing by the Appeals Court Clerk for alleged failure to file a brief which was contested by appellant.

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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RICHARD A. COLE, M.D.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Cole v. *U.S.A.*, USDC WD Pa. Civil Action No. 94-164E (part of Crim. No. 91-28E), July 8, 1994.

Cole v. *U.S.A.*, USCA 3rd Docket No. 94-3613, CLERK ORDER, Dec. 30, 1994.

Cole v. *U.S.A.*, USCA 3rd Docket No. 94-3613, March 26, 1997.

Cole v. *U.S.A.*, USCA 3rd Docket No. 94-3613, May 6, 1997.

JURISDICTIONAL STATEMENT

This case was filed in the United States District Court for the Western District of Pennsylvania based on the court's jurisdiction pursuant to 28 U.S.C. § 2255 since it had heard the underlying criminal case, *U.S.A.* v. *Cole*, USDC WD Pa. Crim. No. 91-28E. The United States Court of Appeals for the Third Circuit rendered its decision by a CLERK ORDER on December 30, 1994. A motion to recall the mandate was filed on October 18, 1996 which was denied on March 26, 1997. A petition for rehearing was filed on April 9, 1997 which was denied on May 6, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 1651 and Supreme Court Rule 10.1(a) and (c).

STATEMENT OF THE CASE

Richard A. Cole, M.D. petitions this Court for a writ of certiorari in this case on the issue of obtaining a hearing on the merits of his habeas corpus petition (motion under 28 U.S.C. § 2255, A. 8a). Cole originally filed his habeas corpus petition on April 22, 1994 in the United States District Court for the Western District of Pennsylvania. It was dismissed without a request for an Answer from the government, without a hearing, and without an explanation on July 8, 1994. Cole appealed to the United States Court of Appeals for the Third Circuit in Philadelphia on July 25, 1994, but his appeal was not docketed until November 9, 1994. Cole was told to file his brief in this case by December 16, 1994. Cole, who was in

prison at the time, and did not have the funds to make copies, sent his brief to his sister in law, Sylvia Cole, to make copies and send them to the Appeals Court. She did this and filed the appropriate brief and copies via Federal Express courier on November 25, 1994. Further, she called Federal Express to make sure they had been delivered, and this was confirmed (A. 15a). Inexplicably on January 3, 1995, Cole received notice via CLERK ORDER (A. 3a) that his appeal had been dismissed for failure to timely prosecute based on Local Rule 107.2 (A. 10a) because Cole had allegedly not filed his brief on time. Cole filed a motion to reinstate the appeal which he sent to Sylvia Cole who made the appropriate number of copies and again sent them to the Clerk's Office via Federal Express. She checked with Federal Express and the Clerk's Office to ensure delivery, and both confirmed that the papers had arrived at the Clerk's Office (A. 15a). Nevertheless, the motion to reinstate the appeal was never heard.

Cole, a pro se litigant, had no idea what to do next, and so filed a second habeas corpus petition in an attempt to have the merits of his petition heard. This second petition was dismissed because Cole could not bring up the same arguments on a second petition after the first petition was dismissed. The district court criticized Cole for failing to prosecute his first appeal. Thereupon Cole filed a motion under Federal Rule of Civil Procedure 60(b) in the United States Court of Appeals for the Third Circuit asking to set aside the judgment dismissing the appeal of the habeas corpus petition, since it was fraud upon the court to dismiss the appeal when Cole had shown by declaration of his sister in law that she had served the brief and the motion to reinstate the appeal via Federal Express, and that she had spoken to Federal Express and the Clerk's Office, and they both had assured her that all was in order (A. 15a).

The Appeals Court considered this motion under Rule 60(b) to be a motion to recall the mandate. The government filed a brief in support of considering the appeal on the issue of bias and prejudice of the magistrate. Despite all this, the Appeals Court refused to reinstate the appeal saying that it was untimely filed pursuant to Local Rule 107(a). Cole filed a petition for rehearing and rehearing *en banc*, and this was likewise denied.

In his habeas corpus petition, Cole raised four major issues of constitutional dimension: 1. ineffective assistance of counsel, 2. bias and prejudice of the magistrate who issued the search and seizure warrant as well as the two officers who swore to the affidavit underlying the warrant, 3. documented perjury of one of the officers who lied about her activity with Cole in a related Drug Enforcement Agency hearing, and 4. bias and prejudice of the trial court judge. None of these issues have ever been heard by any court, nor has any evidentiary hearing ever been held on these matters despite the fact that they had not been fully developed in the record of this case.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE THIRD CIRCUIT HAS ALLOWED A CLERK OF COURT TO DETERMINE THAT COLE'S CONSTITUTIONAL CLAIMS HAVE NO MERIT BY DISMISSING COLE'S CASE ON THE DISPUTED FACT THAT COLE DID NOT FILE HIS BRIEF ON TIME. NO WHERE HAS CONGRESS EVER AUTHORIZED A BUREAUCRAT TO SIT IN JUDGMENT ON ISSUES OF CONSTITUTIONAL MAGNITUDE.

A habeas corpus petition is a sacred right that the founders of this country sought to ensure by providing in the Constitu-

tion that the right to habeas corpus would not be suspended except in times of insurrection. U.S. Constitution, Article 1, Section 9, Clause 2. The habeas corpus petition is the last bastion available to Cole to challenge the Constitutional validity of his conviction. Rather than having a reasoned review of Cole's allegations, Cole has been dismissed by the Clerk pursuant to a local rule which allows the Clerk to dismiss a case for failure to file a brief on time (A. 10a). This Court has repeatedly stated that the writ must be administered with initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.' U.S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ — its capacity to reach all manner of illegal detention — its ability to cut through barriers of form and procedural mazes — have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris v. *Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969).

Cole did in fact file his brief on time, and supplied a declaration from his sister in law to establish this (A. 15a). Logi-

cally, it would be incomprehensible to think that a prisoner who was attempting to gain his freedom would not file on time. Cole had no more pressing matters than filing his brief, and ensured that it was filed on November 25, 1994, well before the deadline of December 16, 1994.

The presumed argument of the Appeals Court is that it must keep its dockets clear of cases which are not actively prosecuted. While this may seem reasonable, Cole argues it is fundamentally unfair and a denial of Cole's right to due process of law to dismiss Cole's appeal by saying that he did not file his brief especially when there is a disputed fact as to whether or not it was filed (Declaration of Sylvia Cole, A. 15a). It is a further denial of due process to deny Cole a hearing or even an adjudication on his motion to reinstate his appeal. Notably, as can be seen in the appeals court docket in the appendix, Cole's record was sent back on the day the appeal was dismissed without even waiting for Cole to file a motion to reinstate the appeal (A. 12a).

How could any logical person believe that a prisoner would not pursue a habeas corpus appeal? Furthermore, under Local Rule 107.2(a) (A. 10a), the Clerk has the obligation of informing the appellant of any deficiency in the filing, and giving him time to correct it. Rather than informing Cole of the alleged deficiency, Cole was summarily dismissed by the Clerk of Court without warning, and not even given the chance to have a motion for reinstatement heard. This Court has objected to such procedure in the past stating:

> And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding

> must not be allowed to founder in a 'procedural morass.'

Harris v. *Nelson, supra* at 394 U.S. 291, quoting *Price* v. *Johnston,* 334 U.S. 266, 269, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948).

All of this is fundamentally unfair in any proceeding, and is especially unconscionable and repugnant to the Constitution in matters of habeas corpus where the emphasis is on seeking justice regardless of procedural flaws. In this case, Cole argues that he has followed all the rules, and the Clerk has risen to status not envisioned by the Congress or the founders of this country to sit in judgment of Cole.

II. The Third Circuit Has Established A Local Rule 107.2 Which Allows The Clerk Of Court Wide And Unchallenged Power To Dismiss Appeals Without Concern For The Merits And Without Avenues Of Redress.

In the instant case, Cole has been denied justice because the Clerk flatly stated that Cole did not send his papers in on time. This is an unreasonable position since Cole had no tactical advantage in lying about whether or not he sent in the papers, and Cole had nothing but time on his hands to file the necessary papers. In fact, Cole supplied a declaration from another party, who sent the material via Federal Express, to the Clerk (A. 15a). Certainly Federal Express has a strong reputation for reliable delivery. In this case, there was a disputed material fact, and no hearing occurred, yet Cole's freedom was in the balance.

In one broad stroke, the Clerk of Court dismissed Cole, and all of Cole's attempts to be heard in Court. This too is a Con-

stitutional violation since the First Amendment guarantees citizens the right to petition the courts for redress of grievances against the government. How can Cole petition if his pleadings are routinely ignored?

To look on the dark side, if one wanted to deprive someone of their rights, why not set up a system wherein one could dismiss all unfavorable pleadings by simply stating that they had never been received? A similar situation exists where a defendant attempts to duck service of process in a law suit. The defendant claims not to have been served, and therefore refuses to show up in court. In that setting, a default and a default judgment can be entered against the uncooperative defendant. In the instant case, the Clerk is above the law because he can dispose of any petition without effective challenge, since he can throw any papers he doesn't like in the trash, and deny ever having received them. Even an appeal of the Clerk's dismissal can be thrown in the trash. Apparently that's what happened in this case, and this is fundamentally unfair, and a denial of Cole's rights to due process of law under the Fifth Amendment.

III. The District Court Failed To Give Cole An Evidentiary Hearing Of His Habeas Corpus Petition In Violation Of 28 U.S.C. § 2255 Which Authorizes A Hearing When There Are Factual Matters In Dispute Which Are Not On The Record.

Cole has alleged four major errors of Constitutional magnitude, none of which has ever been heard in open court.

First, ineffective defense counsel failed to investigate and challenge the validity of the search and seizure warrant issued against Cole. Second, ineffective defense counsel failed to investigate and challenge the bias and prejudice of the magis-

trate judge, and the two officers who swore to the affidavit underlying the warrant. Third, ineffective defense counsel failed to investigate and challenge the testimony of one of the officers who swore to the affidavit for the warrant when she was shown in a related Drug Enforcement Agency hearing to have lied about the same matters. Fourth, ineffective defense counsel failed to investigate and challenge the bias and prejudice of the trial judge.

All these are material facts for which Cole deserves a hearing. This Court has stated that under these circumstances, a petitioner has a right to a hearing.

> It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing.

Harris v. *Nelson, supra* at 394 U.S. 292, quoting *Townsend* v. *Sain,* 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Brown* v. *Allen*, 344 U.S. 443, 464, No. 19, 73 S.Ct. 397, 97 L.Ed. 469 (1953). Cole was denied due process of law by the district court's failure to give Cole a hearing on these material issues which were not fully developed in the record because of the ineffective assistance of Cole's defense counsel.

The government's first objection is that Cole waived all rights to relief by pleading guilty in this matter. Cole only plead guilty on the eve of trial, after a jury was selected, because Cole's counsel suddenly told him that he had no defense for Cole, and that Cole should plead guilty. Law set down by the Court in *Hill* v. *Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203, held that where defense counsels standard of performance fails that expected, a guilty plea cannot be considered as well informed.

> Where defendant enters a guilty plea upon counsels advice, the voluntariness of plea depends on whether advice was in the range of competence demanded of attorneys in criminal cases.

Ibid. In the instant case, had Cole's counsel done his job, the search and seizure would have been rendered illegal and there would be no evidence to move this case forward. Cole would have been acquitted. Cole was severely prejudiced by his counsel who failed to give Cole competent service. The challenge of a search warrant is an elemental duty. There was no tactical reason to excuse challenging the warrant in this case. This Court has determined that failure to file a timely motion to suppress evidence based on an illegal search in similar circumstances constitutes ineffective assistance of counsel.

> While the failure to file a suppression motion does not constitute per se ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under Strickland, reasonable and in accord with prevailing professional norms.

Kimmelman v. *Morrison*, 477 U.S. 365, 367, 106 S.Ct. 2578, 91 L.Ed.2d 305 (1986).

Further, Cole's habeas corpus petition was denied by the same trial judge whom Cole has accused of bias and prejudice.

Logically, how can such a trial judge in good conscience also evaluate the merits of a habeas petition wherein his impartiality has been challenged? This same judge denied the habeas corpus petition without a hearing further suggesting his bias and prejudice.

Cole argues that all these issues should be heard in open court. In fact, all of these issues have been buried. The district court refused to address them, or even allow the government to address them, and waited months before dismissing the petition. Later, the appeals court was tardy in docketing the appeal, and after Cole filed his brief, the Appeals Court Clerk denied receiving the papers.

Cole avers that this case represents a classic example of an attempt to avoid a hearing on the merits. All of the rules and guidelines for allowing a hearing have been broken, and Cole has been repeatedly denied an opportunity to be heard. All of this flies in the face of the statutory, Constitutional, and common law principles upon which a petition for habeas corpus is based, and this should be corrected by this Court.

CONCLUSION

Cole respectfully requests this Court to grant its petition for writ of certiorari in this matter, and that the petition for habeas corpus be granted so that an evidentiary hearing on the merits of Cole's case can finally be heard in the district court before a judge other than the trial judge. Thus far, Cole has been blocked from a hearing in the district court and the appeals court, all in violation of fundamental fairness, and Cole's right to due process of law.

This case offers this Court the opportunity to circumscribe the power of the Clerk of the Appeals Court, who now according to this case, has unfettered power to adjudicate habeas

corpus petitions based on whims and vagaries of bureaucratic rules leaving petitioners with no realistic method to challenge such decisions. To let this case remain would provide a precedent for completely eroding the right to writ of habeas corpus since all petitions in the future could be dismissed for alleged lack of receipt of papers, and be forever buried without justice being served.

I declare under the penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Richard A. Cole, M.D.
PRO SE
PETITIONER
8 Hallisey Drive
Newburyport, Massachusetts 01950
(508) 462-8805

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD A. COLE, M.D. Plaintiff,	)	
v.	)	CIVIL ACTION NO. 94-164E
	)	CRIMINAL NO. 91-28E
UNITED STATES OF AMERICA, Defendant	)	

ORDER

AND NOW, to-wit, this 8th day of July, 1994, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Motion to Amend Habeus Corpus Petition (Doc. 141) be and the same hereby is DENIED;

2. Motion to Vacate (Doc. 138) be and the same hereby is DENIED;

3. Motion for Recusal of Judge Cohill under 28 U.S.C. sections 144 and 455 (Doc. 141) be and the same hereby is DENIED;

4. Motion for Recusal of Judge Cohill from All Proceedings (Doc. 141) be and the same hereby is DENIED.

5. Motion to Vacate All Judgments, Orders and Decrees Against Plaintiffs (Doc. 141) be and the same hereby is DENIED.

/s/ Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
JUDGE

cc: Richard A. Cole, M.D.
Reg. No. 10509-068
BHM-H FPC Maxwell AFB
Montgomery, AL 36112

Asst. United States Attorney

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3613

USA

vs.

Cole

Richard A. Cole, Appellant
(Western District of Pennsylvania Civil No. 91-cr-00028E)

ORDER

Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure and Third Circuit LAR Misc. 107.2,

It is O R D E R E D that the above-entitled case is hereby dismissed for failure to timely prosecute;

It is F U R T H E R O R D E R E D that a certified copy of this order be issued forthwith as the mandate.

For the Court,
/s/ illegible
Acting Clerk

Date: December 30, 1994

cc: Mr. Richard A. Cole
Bonnie R. Schlueter, Esq.

APPENDIX C.

February 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 94-3613

UNITED STATES OF AMERICA

vs.

RICHARD A. COLE, ET AL.

(W.D. PA. CRIM. NO. 91-CR-00028)
(CRIMINAL TREATED AS CIVIL)

Present: GREENBERG, NYGAARD and ROTH,
CIRCUIT JUDGES

Submitted are:

(1) Appellant's motion to reopen the above-captioned appeal; and

(2) Appellee's "Motion to Expedite Proceedings and Motion for Summary Action"

in the above captioned case.

Respectfully,

/s/ P. Douglas Sisk/WMH
P. DOUGLAS SISK
CLERK

ORDER

The foregoing motion to reopen the above captioned appeal is denied as it was filed untimely. LAR Misc. 107.2(a). The government's motion to expedite and to affirm summarily are denied as moot.

By the Court,

/s/ M.A. Greenberg
M.A.GREENBERG
CIRCUIT JUDGE

Dated March 26, 1997

APPENDIX D.

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 94-3613

UNITED STATES OF AMERICA

vs.

RICHARD A. COLE, ET AL.,
Appellant

On Appeal from the United States District Court for the
Western District of Pennsylvania (D.C. Crim. No. 91-00028)

SUR PETITION FOR REHEARING
BEFORE: SLOVITER, Chief Judge, and BECKER,
STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, and
MCKEE, Circuit Judges

The petition for rehearing filed by the appellant, Richard A. Cole, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted

for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:
/s/ M.A. Greenberg
M.A. GREENBERG
CIRCUIT JUDGE

Dated May 6, 1997

APPENDIX E.

Title 28. Section 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeus corpus.

An application for a writ of habeus corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX F.

MISCELLANEOUS LOCAL APPELLATE RULES FOR UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAR MISC. 107.0 SANCTIONS

107.2 Dismissal for Failure to Prosecute.

(a) When an appellant fails to comply with the Federal Rules of Appellate Procedure or the Local Appellate Rules of this Court, the Clerk shall issue written notice to counsel or to the appellant who appears pro se that upon the expiration of fourteen (14) days from the date of the notice, the appeal may be dismissed for want of prosecution unless appellant remedies the deficiency within that time. If the deficiency is not remedied within this period, the Clerk is authorized to dismiss the appeal for want of prosecution and issue a certified copy thereof to the Clerk of the district court as the mandate. The appellant shall not be entitled to remedy the deficiency after the appeal is dismissed except by the order of the Court. A motion to set aside such an order must be justified by the showing of good cause and may not be filed after ten (10) days of the date of dismissal. If the appeal is one taken from the District Court of the Virgin Islands, an additional ten (10) days shall be added to the time limits specified in this paragraph.

(b) Nothwithstanding subsection (a), if an appellant fails to comply with the Federal Rules of Appellate Procedure and the Local Appellate Rules with respect to the timely filing of a brief and appendix, at any time after the seventh day following the due date, the Clerk is authorized to dismiss the appeal for want of timely prosecution. The procedure to be followed in requesting an order to set aside dismissal of the appeal is the same as that set forth in subsection (a).

APPENDIX G.

Proceedings include all events.
94-3613 USA v. Cole

11/9/94	CIVIL CASE DOCKETED. Notice filed by Richard A. Cole. (emp)
11/9/94	RECORD, filed. (Entire Record on 18th floor - 1 box) (emp)
11/9/94	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 12/19/94. (emp)
11/30/94	APPEARANCE from Attorney Bonnie R. Schlueter on behalf of Appellee USA, filed. (emp)
12/30/94	CLERK ORDER (LAR Misc 107.2 - Br/Apx): Procedurally Terminated Without Judicial Action; Default. (sdt)
12/30/94	Certified copy of Order sent to Clerk of District Court. (sdt)
12/30/94	RECORD RETURNED. (sdt)
10/18/96	MOTION by Appellant for Relief from Final Judgment Dismissing this Appeal for Failure to Timely Prosecute Under Authority of Fed. R. Civ. Proc. 60(b)(6), TREATED as a Motion to reopen appeal, filed.

	Answer due 10/24/96. Certificate of Service dated 10/14/96. (jas)
11/25/96	RECORD, received. (jas)
1/30/97	MOTION by Appellee to expedite proceedings AND for Motion summary action, filed. Answer due 02/07/97. Certificate of Service dated 1/28/97. (jas)
2/12/97	RESPONSE by Appellant Richard A. Cole to motion to expedite appeal and motion summary action, filed. Certificate of service dated 2/11/97. (jas)
3/26/97	ORDER (Greenberg, Authoring Judge, Nygaard, Roth, Circuit Judges) denying motion to reopen the appeal as it was untimely filed. LAR Misc. 107.2(a). Denying the government's motion to expedite and to affirm summarily as moot, filed. DPS-126 (rmg)
4/9/97	PETITION by Appellant Richard A. Cole, for rehearing in banc. Certificate of service dated 4/8/97, filed. (rmg)
5/6/97	ORDER (Sloviter, Chief Judge, Becker, Stapleton, Mansmann,

Greenberg, authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Circuit Judges) denying petition for in banc rehearing by Appellant Richard A. Cole, filed. (rmg)

Docket as of May 27, 1997 11:19 am

APPENDIX H.

RICHARD A. COLE, M.D. F.A.C.P., PRO SE,
8 HALLISEY DRIVE
NEWBURYPORT, MA 01950
TEL.(508) 462-8805

APPEARING PRO SE FOR APPELLANT

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D.,	) DOCKET NO. 94-3613
	)
Appellant/Petitioner	)
	)
VS.	) DECLARATION OF
	) SYLVIA COLE IN
UNITED STATES OF AMERICA,	) SUPPORT OF PETITION
	) FOR REHEARING
Appellee/Respondent	) EN BANC

I, Sylvia Cole, declare as follows:

1... I have personal knowledge of the facts stated herein, and if necessary, can competently testify thereto.

2... I served as the mailing agent for my brother-in-law, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

3... Thus Doctor Cole would send me material from Maxwell to be copied with instructions as to where, and how to send it.

4... On or about November 22, 1994, I received a packet of material from Doctor Cole containing, but not limited to, an appellant's brief for his appeal in the United States Court of Appeals for the Third Circuit, Docket No. 94-3613, a motion for an expedited appeal, and a motion for release to his own recognizance. I sent all this material plus my declaration: proof of service by mail to the Clerk of Court, United States Court of Appeals for the Third Circuit, Philadelphia, PA on Wednesday, November 23, 1994, via Federal Express for arrival on Friday, November 25, 1994, since Thursday was Thanksgiving Day. I called Federal Express on Friday, and they assured me that the package was delivered. I have attached a copy of the Federal Express receipt and tracking number.

5... In early January 1995, Doctor Cole called me to tell me that his appeal, Docket No. 94-3613, had been dismissed on December 30, 1994, because of "failure to timely prosecute", and that none of the material I sent had been received. I called the Clerk's Office, and the spokeswoman said that it may have been "the one that was dismissed by accident". I was told that Doctor Cole could simply file a motion to have the dismissal set aside for good cause. I thereupon copied all the material sent earlier. Doctor Cole sent me the motion to set aside this dismissal, and I sent this along with the appellant's brief, motion for an expedited appeal, and my declaration: proof of service by mail to the Clerk of Court, U.S. Court of Appeals for the Third Circuit in Philadelphia, PA, via Federal Express on Friday, January 6, 1995, for delivery on Monday, January 9, 1995.

6... I called the Clerk's Office on Monday, January 9, 1995, to see if the material had been delivered, and was assured by the spokeswoman that all was in order. Despite the fact that I sent a request for a date stamped copy of the cover sheet of each of the documents when I sent the material, I never received any date stamped copies. I have attached the Federal Express receipt and tracking number.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/Sylvia Cole
Sylvia Cole

Executed on April 8, 1997